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No. 83-1326

In the Supreme Court of the United States

OCTOBER TERM, 1983

JAY C. WISSLER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether statements in the prosecutor's closing rebuttal argument constituted reversible error.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	7

TABLE OF AUTHORITIES

Cases:

Henderson v. *Kibbe*, 431 U.S. 145 6

Lawn v. *United States*, 355 U.S. 339 5

United States v. *Flaherty*, 668 F.2d 566 5

United States v. *Hasting*, No. 81-1463 (May 23, 1983) 7

United States v. *Hoffa*, 349 F.2d 20, aff'd, 385 U.S. 293 5

United States v. *Isaacs*, 493 F.2d 1124, cert. denied, 417 U.S. 976 5

United States v. *LaSorsa*, 480 F.2d 522, cert. denied, 414 U.S. 855 5

United States v. *Praetorious*, 622 F.2d 1054, cert. denied, 449 U.S. 860 5

United States v. *Schwartz*, 655 F.2d 140 5

United States v. *Sullivan*, 421 F.2d 676 5

United States v. *Tham*, 665 F.2d 855, cert. denied, 456 U.S. 944 5

United States v. *Trujillo*, 714 F.2d 102 5

Page

Cases—Continued:

United States v. *West*, 670 F.2d 675, cert. denied, 457 U.S. 1124 5

United States v. *Young*, cert. granted, No. 83-469 (Feb. 21, 1984) 5

Statutes and rule:

21 U.S.C. 841(a)(1) 2

21 U.S.C. 846 2

Fed. R. Crim. P. 30 6

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 17-27)[1] is reported at 716 F.2d 1050.

JURISDICTION

The judgment of the court of appeals was entered on September 6, 1983. A petition for rehearing was denied on October 13, 1983 (Pet. App. 30). The petition for a writ of certiorari was filed on December 13, 1983, and is therefore one day out of time under Rule 20.1 of this Court's rules. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Maryland, petitioner was convicted of conspiring to possess cocaine with intent to distribute it, in

[1]The Appendix to this Petition is unnumbered. Following petitioner's example, we are consecutively paginating the Petition and Appendix.

violation of 21 U.S.C. 846 (Pet. App. 18).[2] He was sentenced to five years' imprisonment, all but six months of which was suspended in favor of probation. The court of appeals affirmed (Pet. App. 17-27).

1. The evidence at trial showed that from February through May 1981, petitioner conspired to purchase quantities of cocaine from co-defendant Naylor R. Harrison and co-conspirator Carl Beach. Harrison was a major supplier of cocaine in Maryland and the surrounding states. The conspiracy was exposed when Beach cooperated with a DEA investigation. In the course of the conspiracy, petitioner bought at least nine ounces of cocaine from Harrison and Beach, each time using a testing kit to ensure the quality of the product he was purchasing (Tr. 25-28, 245-246, 265-267). In late May, after Harrison was arrested by Maryland state police on his return from a cocaine buying trip to Florida, Harrison and Beach drove to petitioner's home in Pennsylvania to advise petitioner to "lay low" because the investigation might involve him as well (Tr. 271). In recorded telephone conversations, petitioner also agreed to help Harrison pay his Miami sources for cocaine that Harrison had purchased but was afraid to resell (GX 23, at 2, 17-18). Petitioner also agreed, in a third recorded call, to purchase some of that cocaine whenever Harrison decided to sell it (*id.* at 33).

2. Petitioner's counsel delivered a highly emotional closing argument. At the outset, he expressed his "love" for his client and accused the prosecutor of twisting testimony and presenting a false chart to the jury (Pet. App. 24; C.A. App. 156). Almost immediately, he again accused the prosecutor

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[2]Co-defendant Naylor R. Harrison was convicted on the conspiracy charge and three substantive counts of possessing and distributing cocaine (21 U.S.C. 841(a)(1)). Harrison's conviction was affirmed with petitioner's, but he has not filed a petition for a writ of certiorari.

of misleading the jury, and several times reminded the jury of his anger at such government actions (C.A. App. 157-158, 166). He then dismissed an objection raised by the prosecutor as "another good prosecutorial trick" (Pet. App. 24) and accused the prosecutor of complicity in what counsel repeatedly characterized as Beach's false testimony (*ibid.*). Defense counsel concluded his argument swearing on his "dead son's grave" that petitioner was innocent and relating petitioner's pleas to him made moments before in a private meeting (*id.* at 24-25; C.A. App. 179-181, 834-835).

In rebuttal, the prosecutor first remarked that defense counsel was an excellent actor. Then, after beginning to discuss the law of conspiracy, the prosecutor said that he would let the jury know where he stood. He told the jury that he would "never in a million years say I love that man or that man [indicating the defendants]. I hate them both and I hate their kind and what they're doing to our society." Pet. App. 19; C.A. App. 195.

On defense counsel's objection, the trial court admonished all counsel for having made improper arguments and said that it would instruct the jury that argument was just that (Pet. App. 19). Later, the court told the jury that statements and arguments of counsel were not evidence (Tr. 848), that the court had a duty to admonish an attorney who had acted improperly but that the jury should draw no adverse inference against the party represented by such counsel (*id.* at 850), and that the jury had to perform its duty without bias, prejudice, or sympathy (*id.* at 876). Petitioner's counsel professed himself "pleased" with the instructions (*id.* at 789-791).

3. On appeal, petitioner claimed that the prosecutor's statements in rebuttal warranted a new trial. The court of appeals disagreed. While it found that the prosecutor's remarks were improper, it held that those remarks were

provoked by the equally improper remarks of petitioner's trial attorney, and that the district court's instructions cured any possible prejudice. Pet. App. 19-26.

ARGUMENT

The court of appeals held that the prosecutor's rebuttal comments "clearly were improper" (Pet. App. 19); but, applying standards developed in the Fourth Circuit for evaluating such cases, concluded that the trial comported with due process (*id.* at 26).[3] Among the factors considered by the court were the provocation by defense counsel, the deliberateness of the remarks, the corrective action by the trial court, and the strength of the government's case. Petitioner does not challenge the legal standards applied by the court below (Pet. 10-11), but he disagrees with the factual conclusions the court reached in applying those standards. Petitioner thus raises no issue that would warrant review by this Court.

Petitioner first claims (Pet. 11-12) that the prosecutor's expression of hatred for the defendants was not provoked or invited by defense counsel's own comments. Petitioner focuses only on his attorney's expression of "love" for him, omitting counsel's numerous other improper remarks, including his repeated accusations that the prosecutor had "twisted" testimony and had colluded with co-conspirator Beach in presenting perjurious testimony. He thus concludes that an objection by the prosecutor to the single problematic comment by defense counsel would have sufficed (Pet. 12). In the context of the arguments as a whole, however, the court of appeals correctly concluded that the prosecutor's "concededly improper comments were invited

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[3]The court also determined that this would not be an appropriate case to reverse the conviction in an exercise of the court's inherent supervisory powers. Pet. App. 26-27 n.1.

by the equally egregious conduct of [petitioner's] defense counsel" (Pet. App. 20). See also Pet. App. 24-25 (describing provocations by defense counsel).

Under such circumstances, most courts of appeals have declined to reverse the conviction where the prosecutor's response was prompted by improper comments by the defense. *E.g., United States* v. *Trujillo*, 714 F.2d 102, 105 (11th Cir. 1983); *United States* v. *West*, 670 F.2d 675, 688-689 (7th Cir.), cert. denied, 457 U.S. 1124 (1982); *United States* v. *Flaherty*, 668 F.2d 566, 598 (1st Cir. 1981); *United States* v. *Tham*, 665 F.2d 855, 862 (9th Cir. 1981), cert. denied, 456 U.S. 944 (1982); *United States* v. *Schwartz*, 655 F.2d 140, 142 (8th Cir. 1981); *United States* v. *Praetorious*, 622 F.2d 1054, 1060-1061 (2d Cir. 1979), cert. denied, 449 U.S. 860 (1980); *United States* v. *Isaacs*, 493 F.2d 1124, 1164-1165 (7th Cir.), cert. denied, 417 U.S. 976 (1974); *United States* v. *LaSorsa*, 480 F.2d 522, 526 (2d Cir.), cert. denied, 414 U.S. 855 (1973); *United States* v. *Sullivan*, 421 F.2d 676, 677 (5th Cir. 1970) (per curiam); *United States* v. *Hoffa*, 349 F.2d 20, 50-51 (6th Cir. 1965), aff'd on other grounds, 385 U.S. 293 (1966); see also *Lawn* v. *United States*, 355 U.S. 339, 359-360 n.15 (1958).[4]

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[4]This Court has recently granted certiorari to review a decision of the Tenth Circuit reversing a conviction for an assertedly improper remark by the prosecutor, where the remark was in direct response to closing defense argument impugning the integrity of the prosecution. *United States* v. *Young*, cert. granted, No. 83-469 (Feb. 21, 1984). Although the issue here is related to that in *Young*, we do not believe that the Court should hold the present case pending resolution of *Young*. Here, petitioner does not question the propriety of the "invited response" doctrine rejected by the Tenth Circuit in *Young*. Moreover, unlike in *Young*, the prosecutor's remark below was brought to the attention of the trial court and promptly corrected by it. For that and other reasons, the court of appeals concluded on the facts of this case that the prosecutor's remark did not so prejudice the defense as to constitute reversible error. Thus, even if the Court were to disagree with our submission in *Young* and affirm the judgment there, the decision in this case would not be affected.

Petitioner also contends (Pet. 12-14) that the prosecutor's statements were "purposeful and flagrant" rather than isolated or brief. This is no more than a disagreement with the court of appeals' factual conclusion, based on its examination of the record, that the remarks were "not deliberately placed before the jury in a manner calculated to evoke personal prejudice against the defendants" (Pet. App. 23-24). It raises no issue warranting this Court's attention.

Finally, petitioner challenges the adequacy of the trial court's admonition to counsel at the time of the prosecutor's remark, claiming that it "inured to the benefit of the prosecutor's continued improper remarks and further prejudiced the defendant" (Pet. 15). This assertion is without merit. The judge's admonition, coming upon "heated" verbal exchanges in which both counsel clearly went beyond the bounds of proper argument (Pet. App. 19), was (*ibid.*):

> I will instruct the jury that argument is argument. Now both of you have gotten way out of line and I've let you get out of line and I shouldn't have done it, the whole group of you.

Thus, the trial court clearly communicated to the jury the impropriety of the prosecutor's remarks — as well as of defense counsel's remarks that prompted them. Moreover, as petitioner neglects to point out, the court buttressed this admonition with appropriate curative instructions during the jury charge. Petitioner stated at the time that these instructions were adequate, and he may not now complain that they were not. Fed. R. Crim. P. 30; see *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977). In any event, the court of appeals reasonably concluded that the trial court's admonitions, among other factors, "save[d] an otherwise well-prosecuted case from reversal" (Pet. App. 20). This conclusion was especially appropriate in light of the "formidable

evidence" of petitioner's guilt (Pet. App. 23).[5] On this record, indeed, the court of appeals' conclusions were tantamount to a finding of harmless error. See *United States* v. *Hasting*, No. 81-1463 (May 23, 1983).

In sum, the court of appeals conscientiously considered the various factors relevant to determining whether an improper prosecutorial remark necessitates reversal of a conviction. Petitioner does not challenge the court's interpretation of the law, but only the court's application of accepted standards to the facts of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1984

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[5]Petitioner's factual quarrel with the court's characterization of the strength of the government's case (Pet. 9-10) presents no issue warranting this Court's review.